

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EDC 2616

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FINAL DECISION

APPEARANCES

Respondent: Paul J. Stainback, General Counsel
Vance County Board of Education
Stainback, Satterwhite, Burnette &
Zollicoffer, PLLC
P.O. Box 1820
Henderson, NC 27536

ISSUES

- 1

WITNESSES

Ms. M.J.

Ms. B.L.

Ms. P.

FINDINGS OF FACT

Based upon careful consideration of the sworn testimony of the witnesses at hearing, the entire record in this proceeding, after weighing all of the evidence, and assessing the witnesses' creditability, including demeanor, bias, prejudice, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, and whether the testimony of the witness is reasonable, and whether testimony is consistent with all other believable evidence in the case, the undersigned finds as follows:

1. At all times relative to this contested case the *Student* attended *ABC* Middle School, a school maintained, operating, and existing under the auspices of the Respondent.

2. *Parent* (hereinafter *Parent*) alleged in her petition and testified in the record that *Student* did not receive a free appropriate education due to unjustified suspensions and that one of those suspensions occurred as a result of *Student* possessing marijuana on school grounds (T. pp. 25 and 26); (see petition).

3. *Student* was first diagnosed as having a learning disability in 2000 while he was in the first (1st) grade. This classification was confirmed by Dr. Anthony Laspina, Licensed Psychologist, in his psychological examination of November 18, 2005. *Student* is presently categorized as "Other Health Impaired." *Parent* attended all IEP meetings since *Student* was diagnosed as having a learning disability except for one, which she missed in the fifth (5th) grade. *Parent* attended all IEP meetings which have occurred at *ABC* Middle School, which have consisted of more than ten (10) meetings (T. pp. 29, 30, 31, 32 and 78). (Petitioners' Exhibits 6, 11, and 12).

4. At each IEP meeting *Parent* had an opportunity to discuss her concerns about her child's education, and *Parent* had an opportunity to ask for additional meetings, and additional meetings were allowed (T. p. 32).

5. *Parent* alleged and testified that Respondent had not provided FAPE to her son during the school year 2007-2008 because of unjustified suspensions. *Parent* asked for IEP meetings to discuss the suspensions, and that those IEP meetings were held, but that the IEP meetings resulted in conclusions that the suspensions of *Student* resulted from conduct which were not manifestations of his disability. (T. pp. 33 and 34)(see petition).

6. *Student* is fifteen (15) years of age, and is in the seventh (7th) grade.

Parent believes that *Student* was “never given an opportunity to work toward his goals by being out of,” and “because of the excessive absenteeism.” (T. pp. 35 and 36).

7. Parent participated in her son’s last IEP prepared on January 9, 2009, and agreed upon the IEP (T. p. 51).

8. Parent stated that she was challenging the IEP for the prior school years 2007-2008 because *Student* did not meet his goal due to excessive absenteeism resulting from suspensions. Except for Petitioner’s Exhibit #6 and brief recitals in response to counsel’s questions, Parent was unable to demonstrate, testify to, or produce any evidence as to the precise circumstances of the suspensions, length of suspensions, or specify how the suspensions were a manifestation of *Student*’s disability. (T. pp. 51, 52, 54-62).

9. In addition to *Student*’s classification as OHI (Other Health Impaired) Parent and Ms. B.L. testified that ADD (Addition Deficit Disorder) was an additional classification. Parent was unable to demonstrate, produce a medical evaluation or otherwise connect *Student*’s ADD to *Student*’s conduct, IEP or suspensions. (T. pp. 53, 62, 85, and 86).

10. During the 2007-2008 school year the Parent participated in development of the IEP, in setting up the individualized program for *Student*, and that *Student* had multiple but non-specific suspensions for the 2007-2008 school year (T. pp. 55, 56, 57 and 58).

11. On November 26, 2007, Parent signed and agreed to an IEP indicating that Parent recognized that *Student* had disciplinary issues (T. p. 60).

12. *Student* has shown improvement relative to his grade equivalency during the 2008-2009 school year, and that he also showed improvement during the 2007-2008 (T. p. 61).

13. The *Parent* agrees that the IEP that was agreed upon approximately two weeks prior to the commencement of this contested case hearing is more progressive in terms of addressing the needs of *Student*.

14. Ms. B.L. is a teacher at ABC Middle School, where she is the IEP Chair, and she is *Student*’s case manager. (T. p. 73).

15. The Individualized Education Plan for *Student* in 2007-2008 indicated that the goals were not mastered and among other reference codes, more time was needed because of excessive absences or tardiness (T. p. 76) (Petitioner’s Exhibit # 4).

16. Ms. B.L. testified that *Student* has been categorized as “Other Health Impaired”; that the IEP developed for *Student* was developed with both *Student*’s Parents being present; that the IEP developed was considered to be in the best interest of *Student*; that *Student* made progress in learning (T. pp. 78, 79 and 80).

17. Respondent determined that the suspensions were not the results of manifestations of *Student*'s disability (T. p. 70). Petitioners provided no evidence as to the precise nature and factual basis of the suspensions, how the suspensions related to *Student*'s disability but asserted that *Student* was denied a FAPE because of suspensions that were not justified or were based upon false accusations but produced no detailed evidence or testimony as to the details of these suspensions that were allegedly caused by *Student*'s disability, the services or lack of services available to *Student* during suspensions, or other precise details. The evidence of Petitioner's witness other than Parent, on the contrary, tended to establish that the suspensions were justified and not related to *Student*'s disabilities. (T. pp. 85-88; 91-93).

18. An IEP was developed for *Student* on January 15, 2009. This IEP was developed with the consent of Parent. This IEP addressed the special education needs for *Student*. Parent participated in the development of the IEP. The educational needs of *Student* working within the IEP could be met by Respondent. Ms. B.L. testified as to her intent to implement the IEP through Respondent's best efforts. *Student* made progress during the 2007-2008 school year under the terms of the previous IEP (T. pp. 80, 81, and 82).

19. According to the testimony of Ms. B.L., a witness called by Petitioners, that *Student* made progress under the 2007-2008 IEP and that Respondent can provide *Student* with a free appropriate public education under the current IEP. (T. p. 82).

20. Ms. B.L. testified that if *Student* is suspended for actions that are not manifestations of his disability, that there are provisions in place to accommodate him and that she and his other teachers are willing and prepared to assist. Ms. B.L. knows of no time Parent has asked to meet with the IEP team that such request for a meeting has been denied (T. p. 83).

21. Ms. B.L. stated that *Student*'s behavioral actions resulting in suspensions are not connected to his classification as "Other Health Impaired" (T. pp. 86 and 87).

22. Ms. P. is the Assistant Principal at *ABC* Middle School.

23. Ms. P. stated that *Student* is classified as "Other Health Impaired," and that a child with ADD has attention problems regarding concentration and focusing (T. p. 90).

24. Ms. P. testified that she was on an IEP team relative to *Student*; that Ms. P. knows of no reason why *Student*'s impairment or development would cause *Student*, by way of example, to believe that possession of marijuana on school grounds is not otherwise a crime; that she knows of no reason to justify that throwing ice at a teacher is a manifestation of his disability; that Parent was always present when the IEPs were developed for *Student* (T. pp. 93, 94, and 95).

25. Parent offered no substantial evidence, except her conjecture, that FAPE was denied her son based upon suspensions, no substantial evidence that these suspensions were a manifestation of his disability, no substantial evidence as to the nature or duration of the suspensions, or the services or lack of services available to *Student* during the suspensions, and at the close of all evidence Respondent's counsel moved for a directed verdict in favor of the Respondent (T. p. 97).

26. All evidence taken in the light most favorable to the Petitioner failed to sustain a case that the *Student* was denied a free appropriate public education. Petitioners presented no substantial evidence that the suspensions of *Student* from school were not in conformity with procedures relating to suspension of exceptional children, nor that the suspensions were manifestations of *Student's* disability or other elements required of her burden of proof. Petitioner was given the opportunity to call witnesses, testify, and offer exhibits into evidence.

Based upon the foregoing Findings of Fact, and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (1993).

3. Petitioners have the burden of proof in this contested case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2D 387 (2005). The Petitioners have the burden of proof by a preponderance or a greater weight of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact can not properly act upon the weight of evidence, in favor of the one have the *onus*, unless it overbears, in some degree, the weight upon the other side. Petitioners failed to carry their burden of proof by the preponderance of the evidence or even by the far weaker standard of a directed verdict.

4. *Student* is a child with a disability pursuant to N.C. Gen. Stat. § 115C-106.3 and is entitled to receive a free appropriate public education (FAPE) pursuant to the IDEA, 20 U.S.C. § 1412, 34 C.F.R. 300.121, and the North Carolina General Statutes and the North Carolina Procedures Governing Programs and Services for Children with Disabilities.

5. Respondent is the Local Educational Agency responsible for providing

Student a free and appropriate public education in the least restrictive setting.

6. Respondent is required under federal and state law to make special education and related services available to *Student* and to offer him a free appropriate public education (FAPE) as that term is defined IDEA and state law. The IDEA defines a free appropriate public education as that which provides the disabled student with personalized instruction and sufficient support services to enable the student to benefit from the instruction. *Board of Education v. Rowley*, 485 U.S.176, 102 S. Ct. 3034 (1982); *In re Conklin*, 946 F.2d 306 (4th Cir. 1991); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990).

7. *Student* is entitled to the preparation and implementation of an Individualized Education Program (IEP) as a consequence of being identified as a child with special needs and, thus, is entitled to receive a free appropriate public education (FAPE).

8. FAPE is defined as special education and related services that:

- (1) have been provided at public expense, under public supervision and direction, and without charge;
- (2) meet the standards of the State educational agency;
- (3) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (4) are provided in conformity with the [required] individualized education program.

20 U.S.C. § 1401(8). The undersigned concludes that Petitioner failed to carry her burden of proof that Respondent failed to provide a FAPE to Petitioners pursuant to these factors.

9. The Undersigned heard and considered the admissible evidence which the Petitioner presented at the contested case hearing. Petitioners failed to provide substantial evidence as to the nature of *Student's* suspensions, precisely when they occurred, the duration of the occurrences, the services or lack of services during suspension, or whether these suspensions constituted a change in placement. Disciplinary actions were taken against *Student* but Parent, appearing *pro se*, could not produce nor did she produce evidence in sufficient detail to establish *Student's* disability, its relationship to disciplinary suspensions, its relationship to the IEP, the failure of Respondent to provide FAPE or to refute the testimony of witnesses called in her case in chief that testified that FAPE was provided.

10. At the close of all evidence the Respondent's attorney made a motion for a directed verdict, and the undersigned taking into consideration all of the evidence offered by Petitioners and in the light most favorable to the Petitioners, concluded that the evidence failed to reveal or show that *Student* was denied a free appropriate public education, that his disciplinary suspensions were manifestations of his disabilities, that

his suspensions caused a change in placement or the failure to provide services during any term of suspension. The Petitioners' evidence was lacking in establishing the burden of proof required in the light most favorable to Petitioners, or the burden of proof required by the preponderance. Petitioner testified mostly in conclusionary fashion, without entering into evidence the modicum of evidence required to establish her burden of proof as recited above.

Based upon the foregoing findings of fact and conclusions of law, the Undersigned issues the following:

DECISION

Petitioners' petition is **DISMISSED** as Petitioners failed to carry their burden of proof to establish their entitlement to any relief.

NOTICE

In order to appeal this final decision, the party seeking review must file a written notice of appeal with the Director of the Exceptional Children's Division, North Carolina Department of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the parties' receipt of notice of the decision. *North Carolina Procedures Governing Programs and Services for Children with Disabilities* §.1512J(2).

This the 27th day of March, 2009.

Julian Mann, III
Chief Administrative Law Judge